No. 114

IN THE

Supreme Court of the United States

October Term, 1966

MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT,
Petitioners

v.

NILES SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The Circuit Court of Jackson County issued no opinion. Its order is printed in the record at page 171. The opinion of the Kansas City Court of Appeals, which is unreported, is set forth at R. 193-201. The opinion of the Supreme Court of Missouri *en banc* is reported at 397 S.W.2d 658.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 13, 1965 (R. 204). A timely petition for rehearing was filed on December 28, 1965 and was denied on January 10, 1966 (R. 218). On April 7, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including May 2, 1966 (R. 219). The petition was filed on April 29, 1966 and granted on June 6,

1966 (R. 220). This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

When a union subject to the National Labor Relations Act processed an employee's grievance under a collective bargaining agreement but refused to take it to arbitration because it believed in good faith that it lacked merit:

1. Can the grievant's claim that the union violated its duty of fair representation be adjudicated and remedied in a suit for damages against the union, or does exclusive jurisdiction over such a claim lie with the National Labor Relations Board?

2. If the Board does not have exclusive jurisdiction, does federal law authorize the court or jury to award damages against the union in the absence of any evidence of bad faith or discriminatory motive and solely on the basis of testimony going to the merits of the grievance?

3. Is the proper relief in such a suit an award of damages based on the assumption that the grievance would have been sustained if taken to arbitration, or should the court be limited to entering an order requiring the grievance to be arbitrated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, Section 8, and Article VI of the Constitution of the United States; Sections 7, 8(b), 8(d), 9(a), and 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158, 159 and 160; and Section 301(a) of the Labor-Management Relations Act, 1947, 20 U.S.C. § 185. The pertinent provisions thereof are set forth in full in the Appendix to this petition.

STATEMENT OF THE CASE

This is a class suit originally brought by Benjamin Owens, Jr. in the Circuit Court of Jackson County, Missouri, against the members of the United Brotherhood of Packinghouse Workers and its Local 12 (hereinafter referred to jointly as "the union").

Petitioners Vaca, Mooney and Kobett, officers of the Brotherhood and the Local, were named defendants as representatives of the union's membership (R. 1-2).

The petition for damages alleged that the union was the plaintiff's agent under a collective bargaining agreement with Swift and Company, that the plaintiff had been discharged in violation of that agreement, that he had filed a grievance protesting the discharge and had requested the union to process that grievance to arbitration but that the union had refused to do so and had demanded the payment of $300. By so doing, the petition alleged, the union had "wrongfully, illegally, wantonly, arbitrarily, and with legal malice" prevented plaintiff from exhausting his remedies under the contract, causing him actual damages in the amount of $6,500. The petition prayed for actual damages against the class in the sum of $7,000 and punitive damages of $3,000. (R. 4).

The answer denied the allegations and, in addition, raised the following defenses: (1) that jurisdiction over the subject matter of the action was exclusively with the National Labor Relations Board, which pre-empted the jurisdiction of the courts, (2) that the petition had failed to state a cause of action, and (3) that the petition had not sufficiently alleged that the defendants had exercised bad faith in refusing to process the grievance (R. 5-6).

The case came on for trial before a jury in June, 1964. Most of the testimony was uncontroverted. Owens had worked for Swift and Company as a laborer and as a trimmer since 1946. His job involved the performance of heavy labor and the cutting of meat in a refrigerated room (R.

76-77). He was sometimes required to lift and carry (with a helper) sides of beef weighing as much as 900 pounds each (R. 11), and chucks weighing up to 75 pounds (R. 14).

Owens suffered from a congenital heart condition and high blood pressure, and had been under treatment at the University of Kansas Medical Center off and on since 1956 (R. 60, 75). In May, 1959, Owens, in his own words, "was feeling awfully bad," was "exhausted," and "didn't see any sense in going on killing" himself (R. 71). He decided to leave work in order to rest up (R. 15). The collective bargaining agreement provided for sickness and accident benefits on certification by a physician of physical inability to work (R. 176) and the company physician, a Dr. Saper, gave Owens permission to take sick leave and draw those benefits (R. 37). His own doctor, a Dr. Alexander, then put him in the hospital, where he remained for a week (R. 38).

At the end of August 1959, Dr. Alexander gave Owens a certificate saying that he was physically able to return to his job (R. 16, 39). But when Owens reported to the plant, Dr. Saper took his blood pressure and refused to allow him to work. Indeed, Dr. Saper advised Owens to get back in bed as fast as he could and to stay there (R. 21, 73). Owens continued to draw sick leave until December 18, 1959. He then went to a Dr. Steinzig, who treated him for three weeks and then also gave him a certificate that he was able to work (R. 21). This time, however, Owens presented his certificate to a company nurse who, unaware of his history, sent him back to work. He worked three days—January 6, 7 and 8, 1960—until the medical department of the company discovered he had come back to work and told his superintendent to send him home. (R. 21-23, 192)

Owens then, in early January, 1960, filed a grievance under the collective bargaining agreement. The agreement provided a typical five-step grievance procedure, providing

for discussions at ascending levels of company and union responsibility and terminating, at the fifth step, with arbitration before a named permanent arbitrator (R. 174-176). While the grievance was pending, Owens, at the union's request, went to a number of doctors who gave him certificates either showing his blood pressure at the time of the examination or stating that he was able to work (R. 18, 46). Owens did not inform any of these doctors that he had a history of heart trouble (R. 158).

The union processed the grievance through the second, third and fourth steps of the grievance procedure. In these steps the union, relying on the certificates which Owens had obtained at its request, took the position that Owens was able to work, and that in the event he was not able to do his regular job he should be provided with light work. (R. 186, 188, 190). The company said that it had no light work available to which Owens' seniority would entitle him and that, on the basis of its medical records, Owens' return to his regular job would be hazardous to his life. (R. 110).

In the fourth-step meeting, in which the national union participated, the company told Owens and the union's representatives that in the face of their own doctor's opinion and the report of Owen's treatment at the University of Kansas Hospital going back to 1956, they could not reinstate Owens simply on the basis of certificates that he was able to work or simple blood pressure readings, but would require the report of a complete physical examination (R. 105-6, 124, 136, 145). They then discussed rehabilitation. The company proposed to Owens that he seek help from the heart association in learning a new trade involving lighter work. The company also promised to help him qualify for social security (R. 65). Owens asked time to think it over and, at the union's request, the grievance was simply "held" at the fourth step (R. 124, 190).

A few weeks later Owens, who had hired a lawyer (R.

61), decided that he was not interested in rehabilitation and refused to go to the heart association (R. 65). He asked the union to take the case to arbitration (R. 69). The executive board of the Local, which had the authority to recommend arbitration, met to consider the case. It decided to send Owens to any doctor of his own choosing at union expense, in an attempt to get some better medical evidence. (R. 107, 125). Owens went to Dr. Hesser—one of the doctors who had given him a certificate—to get, in his words, "a real examination." Dr. Hesser said that, as a surgeon, he was not able to conduct such an examination. He recommended a heart specialist, Dr. Day (R. 57, 155).

On February 6, 1961, Dr. Day examined Owens and concluded that Owens was a very sick man indeed (R. 90). According to his written report, Owens' blood pressure was 260/120 or higher (this was the upper limit of the doctor's apparatus). His electrocardiogram showed some heart damage. He had moderate kindney damage. In sum, according to Dr. Day, "Owens is not able to work and the legal problems of Workmen's Compensation would prohibit any company from hiring him. I believe he is entitled to social security disability[1] and I would sign such a paper." (R. 187-8).

In light of this report, the local executive board decided not to appeal the case to arbitration but to keep it in a "hold" status (R. 109, 126) in the hope that something would develop that would justify a further attempt to get Owens back to work. (R. 149).

In February, 1962, Owens filed this suit. Two years later, on May 8, 1964, the grievance was withdrawn at a meeting

[1] To qualify for disability benefits under social security, a person must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long continued and indefinite duration." 42 U.S.C. § 423(c)(2).

with the company at which pending grievances were reviewed. (R. 138)

All of the above was substantially undisputed at the trial. There were a few disputed issues. The first of these concerned the $300 which the complaint alleged the union had demanded. Owens testified that Manuel Vaca, the Local Union President, told him that the case couldn't be won, that the Local would not take it to arbitration because it had no money, but that if Owens would pay Vaca $300 toward the cost of an arbitrator, something might be done. (R. 30, 79-82). Vaca denied ever having asked for $300, or any sum, and testified that he had no power to decide whether the case would go to arbitration. (R. 126). Although, in the light of other testimony,[2] Vaca's testimony seems the more credible, we will here assume that the jury found Owens' testimony to be true, i.e., that Vaca did offer to take the case to arbitration, although he said it could not be won, if Owens would pay the costs.

The other issue in dispute related to the actual fact of Owens' physical condition. Although he introduced no

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[2] The $300 also figured in the testimony of Leonard Jamerson, an employee of Swift and Company, who handled Owens' grievance in the lower steps of the grievance procedure. Jamerson regarded himself as Owens' representative (R. 95). He felt that Owens was right and, in fact, made a motion before the Executive Board to take the case to arbitration because, as he put it, "I can't just sit here and tell how people are, healthy or anything like that." (R. 98).

Owens testified that after he had refused to give Vaca $300 he went to Jamerson and offered Jamerson the $300 "because I trust you more than I will Mr. Vaca." (R. 154). According to Owens, Jamerson refused the money.

Jamerson, who supported Owens throughout, had a somewhat different version. He denied that Owens had referred to any request by Vaca for money. The $300 came up in their conversation, he testified, when Owens volunteered to give him $300 if he could win the case. It is also clear that under the agreement only the National Union could request arbitration (R. 176), and that it would do so only if the local union executive board rather than Vaca, so decided. (R. 98, 103, 127, 140).

medical testimony, Owens' attorney sought to show at the trial that Owens was physically fit. He did this through testimony as to the heavy work Owens had done, on a casual basis, since he left Swift (R. 7-10, 31-36, 78), the baseball games Owens had played (R. 74), and Owens' own statements as to his physical condition (R. 15, 73). Some of this testimony was objected to on the ground that the issue to be tried was not whether Owens was physically fit but whether the union had acted in good faith on the basis of the information available to it. The objection was overruled (R. 74).

The defendants, consistent with their view of the issue to be tried, introduced no testimony, medical or otherwise, on the issue of Owens' health but sought, on cross-examination, to minimize the weight of plaintiff's testimony. Since the jury found for plaintiff, we assume that they found Owens to be physically fit and his discharge by Swift therefore to have been wrongful.

After the close of plaintiff's testimony (R. 82) and, again, at the close of the entire evidence (R. 158), defendants moved for a directed verdict. In both motions the defendants argued, among other things, that there was no evidence that the union's refusal to carry the grievance to arbitration was discriminatory, malicious or in bad faith, and that the subject matter of the action was one within the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act.

The case was submitted to the jury. The Court instructed the jury that if the company's claim that the plaintiff was not physically fit was false and its refusal to reinstate Owens was wrongful, and if the union "arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so) refused to carry" the grievance to arbitration, then the jury should find for the plaintiff. (R. 160-61). The jury was further instructed that if it found that the conduct of the defendant was "willful, wanton and malicious" it could

award punitive damages against the union (R. 162). On the other hand, the court instructed the jury that if it found that the union and its representatives acted "reasonably and in good faith," and not "maliciously, arbitrarily, wantonly or *wrongly*," it should find for the defendants. (R. 162, emphasis added).

The jury returned a verdict for Owens in the sum of $10,300: $7,000 for actual damages and $3,300 for punitive damages (R. 165). The defendants thereupon moved for judgment in accordance with their prior motion for a directed verdict, and in the alternative for a new trial. In addition to the grounds previously urged, the motion complained of the trial court's failure to instruct the jury as to what constituted a wrongful refusal by the union to take the case to arbitration, and the assumption, implicit in the court's charge, "that the result of an arbitration proceeding would have been the restoration of the job and seniority rights to plaintiff." (R. 168-169). The court sustained the motion on the ground that the conduct of the defendants was arguably protected under the National Labor Relations Act and that exclusive jurisdiction over the subject matter lay with the National Labor Relations Board. (R. 171).

Owens appealed to the Kansas City Court of Appeals. Prior to argument, he died and his administrator was substituted as the appellant.[8] (R. 202). The Court of Appeals on April 5, 1965, affirmed the judgment of the trial court, with one judge dissenting. (R. 193-201). On motion for rehearing or transfer to the Supreme Court of Mis-

[8] Since Owens died subsequent to the trial, the death certificate is not contained in the record. It is on file at the Kansas City Department of Health, Division of Labor Statistics. Certificate of Death No. 20716 shows that Benjamin Owens, Jr., died on December 8, 1964 and that the cause of death was "cardiovascular accident due to hypertension." The record does show the substitution of his administrator on January 18, 1965. (R. 202).

souri, the Court of Appeals transferred the case to that Court (R. 203).

On December 13, 1965, the Supreme Court of Missouri reversed the Court of Appeals. The court's opinion dealt primarily with the issue of federal pre-emption, and concluded that the National Labor Relations Act had not pre-empted the jurisdiction of the Missouri courts. The court reasoned that the conduct of the defendants was not arguably an unfair labor practice because there was no showing that the union had discriminated against Owens. The union had nothing to do with Owens being discharged, it said, there was no evidence that it desired that some other member of the union obtain the job from which he had been discharged, nor was there any evidence to indicate that the union's representatives took any action to prevent the re-employment of Owens or to expel or suspend him from union membership. The crux of the plaintiff's claim was that he was wrongfully discharged by the employer, and that the union wrongfully refused to process his claim to arbitration and thus prevented him from being restored to his job. Since discrimination was neither alleged nor submitted to the jury as an element of the claim, the court concluded, the defendants' action was not arguably an unfair labor practice and the Missouri courts had jurisdiction.

The court also dealt with the defendants' contention that there was no evidence to support the verdict. Viewing the evidence concerning Owens' physical condition in the light most favorable to appellant, the court said, there was sufficient evidence from which the jury reasonably could have found that the union, as the plaintiff's agent, had arbitrarily and without just cause or excuse refused to carry the grievance to arbitration.

On this basis the court ordered that the cause be remanded with directions to reinstate the verdict for the plaintiff, with only the modification that the award of puni-

tive damages in the amount of $3,300 be reduced to the $3,000 prayed for in the complaint. (R. 205-218).

SUMMARY OF ARGUMENT

I

Collective bargaining, as it has developed under the National Labor Relations Act, is "an effort to erect a system of industrial self-government." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960). The basic collective bargaining agreement is typically a comprehensive code governing virtually all aspects of the employment relationship. The agreement is necessarily phrased in general, and sometimes ambiguous, language, which requires daily interpretation and application. The employer, in the process of managing the business, interprets and applies the agreement in the first instance, but his actions are then ordinarily subject to challenge through a contractual grievance procedure.

The typical grievance procedure usually begin with a conference between the aggrieved employee and his foreman. If the matter cannot be settled at that level, it can be appealed, usually by the union, through a series of steps involving union-management conferences at increasingly higher levels of authority. If no settlement is reached at any of these steps, the agreement generally provides that the union may refer the matter to arbitration. The agreement in the present case contained this type of grievance procedure.

Such a grievance procedure can only work if the vast majority of grievances are settled at one of the preliminary steps. If both parties adhere adamantly to their initial positions, regardless of the merits of the case, and insist that all grievances be arbitrated, the procedure would simply break down, to the disadvantage of all of the employees. It is both physically and financially impossible to arbitrate

all grievances. Thus, the union's role in the handling of grievances is not merely to prosecute individual claims regardless of their merits, but also to protect the interests of all employees by screening grievances, dropping frivolous ones, and compromising doubtful ones.

The problem in this case, therefore, is to strike the proper balance between the interests of the individual grievant and the interests of the group in the preservation of an effective grievance procedure.

II

Federal law establishes the legal framework within which collective bargaining takes place, and within which this balance must be struck. The National Labor Relations Act establishes the right of employees to bargain collectively and the authority of a union chosen by a majority to act as the exclusive bargaining representative of all employees in a bargaining unit. In the exercise of this authority, a union has broad discretion to make and implement bargaining decisions which it believes to be in the interest of all or most of the employees represented, even though, at times, such decisions may be contrary to the interests of certain employees. On the other hand, a union has a duty to act fairly and in good faith, without hostility toward or invidious discrimination against any employee.

These principles governing the union's authority and responsibility apply to both the negotiation of an agreement and the handling of grievances. Collective bargaining is defined by the Act as including not only the negotiation of an agreement, but also of "any question arising thereunder." While a proviso to Section 9(a) also allows an employer to deal directly with an individual employee in the adjustment of a grievance, this does not negate the union's authority and responsibility in this area if the grievance is not settled. Accordingly, contractual grievance procedures, such as the one involved in this case, typically

give the union the exclusive authority to decide whether grievances should be processed into the higher steps if the employee himself is unable to obtain relief: if the union refuses to take the grievance, the individual himself has no contractual or legal right to process it further under the contract. The question in this case, therefore, is what right, if any, the aggrieved employee has against the union after it exercises that authority not to arbitrate.

The principles which this Court has developed with respect to arbitration in suits under Section 301 of the Labor Management Relations Act are, of course, relevant to this question. But the liability sought to be imposed is statutory, not contractual. A suit against the union for breach of is duty to an individual grievant is not a suit to enforce the collective bargaining agreement under Section 301. *Humphrey* v. *Moore*, 375 U.S. 335 (1964), is not to the contrary. The plaintiff employee in that case sued to enforce his contractual rights against the employer. In order to do so, he had to challenge a grievance settlement made by his union with the employer, and he therefore joined the union as a defendant and claimed, *inter alia*, that the settlement was made in violation of the union's duty of fair representation, and was therefore void. But the essential nature of the suit was to enjoin a violation of the collective bargaining agreement by the employer. In the present case, on the other hand, the employer is not a party, and the suit must be sustained, if at all, as one to remedy a violation by the union of its statutory duty.

III

There was no evidence, and no finding, in this case of bad faith, dishonesty, or discrimination on the part of the union. At most, the plaintiff was able to convince a jury, on the basis of conflicting evidence, that his grievance had merit. A union which exercises its responsibility to settle a grievance should not be held liable on any such basis but

only for violation of the duty of fair representation.

To permit such *de novo* review by a court or jury of a union's good-faith evaluation of the merits of a grievance would greatly impede, if not destroy, the ability of unions to settle grievances. Many grievances involve factual disputes, and there is usually some evidence to support the grievant's version of the facts—his own testimony, if nothing else. If a union is to exercise its responsibility to settle grievances, it must have the authority to make an evaluation of the evidence, without the risk of substantial liability if a court or jury disagrees with that evaluation. Federal labor policy favors the settlement of disputes, including grievance disputes, through free collective bargaining. This process cannot operate if every settlement which is adverse to any individual employee is reviewable *de novo* by the courts.

The standard which must be applied in cases of this kind must be the same standard as this Court has previously applied in other cases: the union must act fairly and in good faith. Here the plaintiff made no claim of, and produced no evidence even suggesting, bad faith or discrimination. The union, for its part, affirmatively showed that it had carefully investigated the grievance and had decided against arbitration only on the basis of an impartial medical report. And, finally, the Supreme Court of Missouri specifically affirmed the jury's verdict on the ground that there was no union discrimination against or hostility to the plaintiff but only a dispute as to the merits of his grievance.

IV

Prior to 1962, it had generally been assumed that a violation of the duty of fair representation which is implicit in Section 9(a) of the Act was not an unfair labor practice under Section 8 and that the duty was, therefore, enforceable by the courts. Beginning in 1962, however, the National Labor Relations Board has held, in a series of cases, that a

violation of the duty of fair representation is an "unfair labor practice" remediable by the Board.

The Board's jusisdiction to remedy unfair labor practices is, of course, exclusive. This exclusive jurisdiction extends not only to conduct which is concededly an unfair labor practice, but also to conduct which is "arguably" an unfair labor practice. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). Thus, even though the Board is divided as to whether a violation of the duty of fair representation is an unfair labor practice, the courts must respect the Board's decisions on this question until the issue is finally settled on review of a Board order. Accordingly, the present case should have been dismissed for lack of jurisdiction.

V

Whether the appropriate forum be a court or the National Labor Relations Board, the appropriate remedy where a union has breached its fiduciary obligation to process a grievance to arbitration is not an award of damages but an order directing that the grievance be arbitrated.

A suit for damages, whether brought against the union or against the employer, has two major defects. First, it requires that the court determine not only the issue of the union's breach of its obligation to the employee, but also the merits of the employee's grievance against the employer. By thus permitting judicial determination of a question which should be determined in the arbitration tribunal, a suit for damages runs contrary to the principles enunciated in the line of cases beginning with *Lincoln Mills* and ending with *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965). In *Maddox*, the Court recognized the interest of the union in participating in interpretations of the contract and in having an arbitrator rather than a court decide questions arising under it. Both the union and the employer have such an interest and that interest would be ignored if a

suit for damages could be entertained against either.

Second, the remedy in damages has quite different consequences to both the plaintiff and the defendant than the remedy usually available before an arbitrator. In a discharge case such as this one, for example, the usual remedy in arbitration is reinstatement with back pay, while the remedy granted in a damage suit, whether against the union or the employer, is usually the earnings, both past and prospective, lost by the discharged grievant.

Nichols v. *National Tube Co.*, 122 F. Supp. 726 (N.D. Ohio, 1954), reversed *sub nom, United States Steel Corp.* v. *Nichols,* 229 F.2d 396 (6th Cir. 1956), provides an apt illustration of both problems. The district court there granted damages based on the plaintiff's life expectancy on a finding that his compulsory retirement at age 65 was contrary to the collective bargaining agreement. The court of appeals reversed because it construed the agreement as permitting compulsory retirement. Both decisions illustrate the problems created by a suit for damages.

For these reasons we believe that the appropriate remedy, where a union has allegedly violated its duty in failing to take a case to arbitration, is a suit against both the union and the employer for an order directing that the grievance be arbitrated. If the court (or the Board) finds that the union has violated its fiduciary obligation, it should enter an order containing appropriate safeguards to insure fair presentation and decision. Where appropriate, such an order should also provide for recovery by the employer against the union for any damages which the employer may suffer due to the expiration of the time limits for requesting arbitration, since such costs are attributable to the union's failure to request arbitration without a court order. Such a remedy is consistent with the federal labor policy and appropriately preserves the rights of the grievant, the union and the employer.

In this case suit was brought separately against both the

union and the employer. Each suit required, for decision, that the court rather than an arbitrator determine the merits of the grievance. And each suit requested damages rather than reinstatement and back pay. For the reasons indicated, we believe that neither suit was proper and that the judgment obtained in this one should be reversed.

ARGUMENT

INTRODUCTION

This case presents yet another aspect of the developing federal law governing the relationship between union, employer and employee in the administration and enforcement of the collective bargaining agreement. The precise questions in this case—the nature of the union's responsibility to process an individual employee's grievance, the appropriate forum in which that responsibility may be enforced and the nature of the remedy to be provided—cannot be decided without reference to the context, both factual and legal, in which these questions arise. We will, therefore, attempt first to sketch out both the nature of the process and those aspects of the law governing it which this Court has so far defined. We will then address ourselves, within that framework, to the particular questions presented here.

I. THE PROCESSING OF GRIEVANCES UNDER A COLLECTIVE BARGAINING AGREEMENT IS AN INTEGRAL PART OF THE COLLECTIVE BARGAINING PROCESS

Collective bargaining, as it has developed under the National Labor Relations Act, in most cases involves much more than the negotiation of increases in wage rates. The typical collective bargaining agreement covering an industrial plant has been aptly described by Archibald Cox:

> "No state or federal statute, except possibly the tax laws, covers as wide a variety of subjects or impinges

> upon as many aspects of the ordinary company's business or a worker's life—wages, hours of employment, working conditions, health and accident, insurance, retirement, pensions, promotions, lay-offs, discipline, subcontracting, technological changes, work loads, and a host of minor items. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490 (1959).

Or, as this Court described the agreement, in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960) "a collective bargaining agreement is an effort to erect a system of industrial self-government."

This self-government has two interrelated aspects. The first is legislative—the enactment through collective bargaining of the basic code of rules to govern the relationship between employer and employee. Typically, this code is adopted for a fixed period of years. Its termination date, unlike the termination date of an instrument of commerce, is not the end of the relationship but the agreed upon time for the negotiation of amendments to the code.

The second aspect is administrative and judicial. Obviously the collective bargaining agreement like any statute covering so much in so few words, requires interpretation and application. And this is supplied by the grievance procedure.

The agreement, of course, is acutally administered by the employer, not by the union or by the employees. Joint administration is rare, if not non-existent, in the American experience. It is management's job to recruit and hire employees, to train them, to schedule the work, to assign workers to jobs, to transfer and promote employees, to pay the wages and determine the appropriate rate of pay, to lay off workers and to recall them when business picks up, and to discharge them or relieve them from work. In these actions, and all of the others which comprise the management of the enterprise, the employer is the actor and the director. The agreement guides his actions, but it is the employer who

makes the decisions in the first instance. See Davey, *Contemporary Collective Bargaining* (1959), p. 118.

The machinery by which those actions are tested and by which, through such testing, specific content is given to the rules expressed by the agreement is the grievance procedure. The employer acts. If an employee believes that the action is contrary to the agreement, he grieves. "The processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960).

Grievance procedures follow a fairly uniform pattern. The first step is usually a conference between the aggrieved employee and his foreman, sometimes with and sometimes without a union representative present. Subsequent steps usually involve a series of meetings between union and employer representatives, at increasingly higher levels of authority. If the matter cannot be settled at any of these steps, the union typically has the right to refer the dispute to binding arbitration.

The existence of these steps and the function they perform are of the utmost importance for this case. The steps are not merely formalities, or delaying devices. The fact that they exist almost uniformly in collective bargaining agreements is testimony that all parties regard them as significant and important parts of the system.

The function of the steps is to resolve, through analysis, review and bargaining, as many grievances as possible without arbitration. It is essential to the process that this be done. And the extent to which it is done is, in large measure, an indication of the health of the system of self-government. Indeed, one of the persistent problems faced by collective bargaining in the United States is to isolate and remedy the causes of "distressed" grievance procedures. As Arthur Ross, then Director of the Institute of Industrial

Relations, University of California, and now United States Commissioner of Labor Statistics, wrote in 1959:

> "There is no doubt that some parties arbitrate too much. They arbitrate chronically and promiscuously. Arbitration becomes a mill, rather than a court of last resort, a substitute for the grievance procedure rather than a means of strengthening it."[4]

Where this happens, as appears to be the case under the National Railroad Adjustment Board, the consequence is not only delay but a failure of the procedure and of the ultimate arbitration itself to fulfill its function of interpreting the agreement and settling disputes. See Mangum, *Railroad Grievance Procedures,* 15 Industrial and Labor Relations Review 474, 498 (1962).[5]

The grievance procedure, then, is an extension of the bargaining process. The agreement itself establishes the broad rules. As cases develop, it is the function of the grievance procedure to develop and implement the rules through the settlement of cases, by agreement where possible and by arbitration if agreement is impossible. As one authority has described it:

> "The grievance procedure is really a conference technique by which two parties agree on how a rule (which both accept) should be applied in a particular situation." Chamberlain, *Labor* (1958), 238.
>
> "The significance of this . . . procedure can hardly

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[4] Ross, "The Role of the Law in Arbitration: A Panel Discussion." *Arbitration and the Law,* Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators (BNA, 1959), p. 72. See also Ross, "Distressed Grievance Procedures and Their Rehabilitation," *Labor Arbitration and Industrial Change,* Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators (BNA, 1963), p. 104.

[5] In the First Division, covering operating employees, the average time for processing a grievance through the arbitration proceedings of the Board is about six years (one or two years for processing on the properties plus between four and five year for processing by the Board). *Id.* at 494.

be overstressed. It is one of the truly great accomplishments of American industrial relations. For all of its defects—the bypassing of some of the appeals stages, its use by the union as a political device to convince the employees that it is looking out for their interests, the slowness with which it sometimes operates—it constitutes a social invention of great importance." *Id.* at 240.

The system works only where each party makes an effort to maximize the number of cases settled by agreement and to minimize the number of cases settled by arbitration.

Grievances, of course, are of all sorts. Some involve the simplest of factual disputes. Others involve complex calculations of rates of pay, as under incentive plans. Some involve only the interests of the grievant. Others may involve conflicts between employees. Almost every seniority grievance, for example, involves a claim that the grievant, rather than some other employee, should have been promoted to a particular job, or retained at the time of layoff, or recalled to work when the level of operations increased. Still others involve the interpretation of general or ambiguous language in the agreement and their disposition will settle not only the particular case but the meaning of the contractual provision for the future.

It is because of this variation that the procedure contains steps. Some disputes as to the propriety of management's action can be settled between the worker and the foreman, some need the involvement of the division superintendent and the union representative and so forth, up to—in the contract in this case—the fourth step, which involves the General Superintendent of the Company and the national representatives of the union.

Whatever the nature of the grievance, however, both the union and the employer have a vital interest in utilizing the grievance procedure, to the maximum extent possible, as a settlement machinery. The interests of the employees as a

group, which the union represents, demand a course of conduct other than blind and undeviating pursuit of every individual's claim. Insistence upon a literal interpretation of language which produces an absurd result may be the way to maximize the interests of a particular grievant, but next week, when the union pleads for common sense in handling another grievance, its words will be thrown back in its face." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 608 (1956). On the other hand, if a union shows a willingness to drop frivolous grievances, and compromise doubtful ones, the employer will be inclined to be equally accommodating. Finally, of course, unless both sides make a sincere effort to use the grievance steps for the purpose of settling grievances, rather than as mere way stations on the road to arbitration, the procedure itself will break down.*

Because every grievance, to some degree, involves the interests of all employees, most agreements provide, as the one in this case does, that the union, rather than the individual grievant, will control the higher steps of the grievance procedure, including arbitration. The interest of the group in the existence and continued efficient functioning of the procedure requires that the union exercise responsibility and discretion in the prosecution of grievances.

It is in the light of this institutional requirement that we approach the question of the rights of the individual griev-

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*One of the reasons for the distressed nature of railroad grievance procedures has thus been described:

"An unusual propensity for buckpassing seems typical of railroad labor relations. The railroad brotherhoods are highly democratic and not well structured for firm decision making. Local chairmen accept and process weak cases, either because it is not politically expedient to question the validity of the case, or on the off-chance the case may ultimately be sustained. General chairmen pass the cases on for the same reasons." Mangum, *Railroad Collective Procedures*, 15 Industrial and Labor Relations Review 499 (1962).

ant where the union fails or refuses to process his grievance. That question must be answered, we believe, by striking an appropriate balance between the conflicting interests of the group and of the individuals comprising that group. Before addressing ourselves directly to the problem, however, we think it appropriate to sketch out the sources of the law applicable to the problem and the extent to which the existing decisions of this Court confine the possible solutions.

II. THE NATURE AND SCOPE OF A UNION'S OBLIGATION TO INDIVIDUAL EMPLOYEES IN THE HANDLING OF THEIR GRIEVANCES MUST BE DETERMINED AS AN ASPECT OF THE UNION'S DUTY OF FAIR REPRESENTATION

The system of contract negotiation and administration which we have thus far described is based upon and governed by federal law, and this Court has already defined certain aspects of the problem in applying that law.

(a) The National Labor Relations Act.

The first source of the federal law is the National Labor Relations Act. Section 7 of the Act, 29 U.S.C. § 157, confers upon employees the right to bargain collectively. And Section 9(a), 29 U.S.C. § 159(a), provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." Pursuant to that provision an employer is required to negotiate with a properly designated union—and only with the union—concerning those subjects. See *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944).

This Court has, in a series of cases, indicated the breadth, and the limits, of the union's right to subordinate indi-

vidual rights to the group interest in the negotiation of agreements. In *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521 (1949) the Court held valid, against a veteran's claim, a provision, inserted in a collective bargaining agreement during his military service, providing top seniority rights for shop stewards or union chairmen, superior to the preferential rights granted to veterans by law. Such a provision, the Court said, benefited all of the employees, veterans as well as nonveterans, "by promoting greater protection of their rights and smoother operation of labor-management relations." 337 U.S. 521. Therefore, even a veteran whose seniority status was protected by law could be laid off pursuant to the provision enacted in his absence giving superseniority to union stewards.

The authority of the collective bargaining representative is not unlimited. In a series of cases which first arose under the comparable provisions of the Railway Labor Act, the Court held that the grant of exclusive bargaining authority carried with it a responsibility to make an honest effort to serve the interests of all, without hostility to any. *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944). See also *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). This duty, the Court held, not only limited the authority to make an agreement. It provided an affirmative basis upon which suit could be brought for injunctive relief and for damages. See: *Central Georgia Ry.* v. *Jones*, 242 F.2d 230 (5th Cir. 1956), *cert. denied*, 352 U.S. 848 (1956), *Richardson* v. *Texas & New Orleans R. Co.*, 242 F.2d 230 (5th Cir. 1957).

In 1953 the Court made it clear that this same duty applied under the National Labor Relations Act. In *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), suit was brought for an injunction against the continued enforce-

ment of an amendment to the seniority provisions of the agreement giving veterans who had not previously worked at Ford seniority credit for their military service. The plaintiffs claimed this amendment discriminated against employees who had been hired before the veterans and before the adoption of the amendment. The Court accepted the proposition that the principle of the *Steele* case applied under the National Labor Relations Act, and restated it, but found against the plaintiffs. "The complete satisfaction of all who are represented," the Court said, "is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good-faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

These cases dealt only with the negotiation of the collective bargaining agreement, not the adjustment of grievances under an agreement. But the same statutory provisions provide the source of law in the latter area. The Act specifically provides, in Section 8(d), 29 U.S.C. § 158(d), that the duty to bargain includes not only the duty to negotiate an agreement but also the duty to negotiate "any question arising thereunder." 29 U.S.C. § 158(d). And Section 9(a) itself contains a specific proviso dealing with the adjustment of grievances. After setting forth the principle of exclusive representation, it continues:

> "Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Most collective bargaining agreements, like the agree-

ment in this case, conform to this statutory mandate. In the lower steps of the procedure (here in the first two steps) the individual worker is permitted to present the grievance. But the higher steps, including the arbitration step, are solely within the union's control, as representative of the entire group. Although this Court has never passed directly on the question, most courts have held that the union has the power to settle a grievance at one of these steps—either by dropping it or by accepting a compromise—and that the individual cannot veto that decision and continue to process the grievance on his own. *Black Clawson Co.* v. *International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962); *Palnau* v. *Detroit Edison Co.*, 301 F.2d 702 (6th Cir. 1962); *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *affirmed* 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960). See also Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 616-30 (1956).

There is a minority view which holds that the proviso to Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), gives an individual an indefeasible right to process his grievance on his own if his union refuses to do so. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962); *Donnelly* v. *United Fruit Co.*, 40 N.J. 61, 190 A.2d 825 (1963). The more widely accepted interpretation of this language, however, is that its "only effect" is "to make it plain that the employer's duty to bargain exclusively with the representative designated by a majority of the employees is not violated if he chooses to receive grievances from individuals," but that "an employer may lawfully promise the union not to process individual grievances and may also give the union the only legal right to compromise or enforce substantive obligations." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 624 (1956). See also Comment, *Federal Protection of Individual Rights Under Labor Contracts*, 73 Yale L.J. 1215, 1216-22 (1964).

This Court did, in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711 (1945), 327 U.S. 661 (1946), sharply distinguish between the authority of a union to make a collective bargaining agreement under the Railway Labor Act and its authority to settle a grievance under that Act. On the basis of that distinction it held that, under that Act, a union settlement under the Adjustment Board procedures did not preclude an individual suit. But there, of course, the grievance procedure is established by statute, not by contract. And the Court's holding, at the most, constituted a reading of the statutory procedure. In agreements under the National Labor Relations Act, to the contrary, the procedure is established by contract. And, with the dissent noted, most courts have refused to override the explicit provision in the contract giving the union exclusive control over the higher steps of the adjustment machinery.

Assuming as we do, therefore, that the union's action in settling, or dropping a grievance, is in accordance with its statutory power, we are faced with the question in this case —what, if any, right of action does the aggrieved individual have against the union after it exercises that power. Before turning to that question, we examine briefly the other possible source of federal law governing the question, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

(b) Section 301 of the Labor Management Relations Act

While the right to bargain collectively, and the duty to do so, set forth in Sections 7 and 9 of the National Labor Relations Act, were made enforceable through the procedures of the National Labor Relations Board, Congress decided in 1947 that the enforcement of collective bargaining agreements, once made, should be "left to the usual processes of the law."[7] It therefore provided in Section 301 that

[7] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

suits to enforce such agreement could be brought in the federal district courts. It is now well established that Section 301 is not only a grant of jurisdiction but also the source of federal substantive law "which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957). It governs any claim based on a collective bargaining agreement, whether brought in a state or federal court. *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962).

Following *Lincoln Mills*, this Court has established certain principles which bear on the problem in this case. *Lincoln Mills* itself established that the promise to arbitrate was enforceable by suit under section 301. In *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), the Court held that in such a suit the question whether a particular dispute came within the arbitration provision was to be decided by the courts but that, in so deciding, doubts should be resolved in favor of coverage and an order to arbitrate should not be denied "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. at 582-583. It came to that conclusion because, in the Court's words, "the grievance machinery is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process." 363 U.S. at 581.

In *Smith* v. *Evening News*, 371 U.S. 195 (1962), the Court held that Section 301 encompassed not only suits by unions but also suits by individual employees against the employer to recover rights claimed under the collective

agreement. In that case "there was no grievance arbitration procedure" (371 U.S. at 196, fn. 1) such as existed in *Warrior & Gulf* and in this case. Where such procedure does exist, the Court subsequently held in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), the employee must attempt to use it, and cannot bring suit directly on the contract.

One final case deserves note—*Humphrey* v. *Moore*, 375 U.S. 335 (1964). In that case, Moore, an individual employee brought suit against both his employer and the union, seeking to enjoin his prospective termination from employment as in violation of the seniority provisions of the collective bargaining agreement. One obstacle in the way of Moore's suit to enforce the agreement was that his seniority rights had been the subject of a grievance and a settlement of that grievance adverse to Moore had been made by the joint union-management committee established under the grievance procedure. This settlement, Moore contended, was invalid for two reasons: first, he claimed, the joint union-management committee which made the settlement had exceeded its authority under the provisions of the agreement which established that committee; second, he alleged, the union in making the settlement had violated its duty of fair representation. He therefore sought an injunction against his discharge which, he claimed, "would violate the contract." 375 U.S. at 344.

The majority of the Court assumed, "with Moore and the courts below" that the committee's authority was limited and that a settlement which exceeded the committee's auhority could be set aside as if it were an arbitrator's award. 375 U.S. at 345. It concluded, however, that the committee's authority was not limited by the agreement in the way the plaintiff claimed but, to the contrary, that the settlement was in accordance with the agreement. It rejected the plaintiff's second claim that the union had violated its duty of fair representation and concluded that it

had acted "honestly, in good faith and without hostility or arbitrary discrimination." 375 U.S. at 350. Therefore, the Court concluded, the grievance settlement was valid and binding on the plaintiff and barred the suit.[1a]

In a concurring opinion, Justices Goldberg and Brennan came to the same result via a different route. The settlement, they believed, should not be viewed as if it were an arbitrator's award but as, itself, a collective bargaining agreement. Since the grievance procedure was part of the continuous collective bargaining process, the parties had a right, in that procedure, to go beyond the provisions of the underlying agreement and make a new agreement, modifying if necessary the underlying contract. Suit could therefore not be brought under Section 301 to enforce the prior agreement since, even if the plaintiffs were right, the parties had a right to change it. The suit could be brought, in their view, only as one against the union for breach of the duty of fair representation under the doctrine of *Ford Motor*

[1a] All members of the Court treated the settlement which "sandwiched" seniority lists and thus reduced Moore's relative seniority status as a grievance settlement. The Court described the union's actions as "the settling of the grievances at issue." 375 U.S. at 343. The concurring opinion of Mr. Justice Goldberg specifically described the settlement as "a mutually acceptable grievance settlement." 375 U.S. at 352. Mr. Justice Harlan described it as a "grievance settlement." 375 U.S. at 359. We have therefore so treated it here.

It is extremely doubtful, however, whether the decision of the joint committee was a grievance settlement in the usual sense of a settlement of a complaint that the contract had been violated, or that it was arbitrable as such a grievance. The contract did not provide for "sandwiching," or for any other role, to cover cases of merger or absorption. It provided instead that, in such cases, the seniority of the employees would be settled by agreement and that the grievance procedure would be utilized as the method for negotiation.

It is our view, therefore, that the approach to the question of § 301 jurisdiction by Justices Goldberg and Brennan was the more appropriate, not necessarily because the settlement of a grievance should be treated as a new agreement between the parties but because the settlement involved in the case was not really a grievance settlement at all. As stated, however, no Justice so regarded it.

Co. v. *Huffman.* They concurred, however, that no case had been made out under that doctrine.

Mr. Justice Harlan concurred with the majority insofar as it treated the suit as one to enforce the underlying agreement, saying that the committee was a grievance, not a negotiating, committee and he saw no reason why an individual could not sue the employer if the settlement made by that committee was contrary to its authority. Insofar as the claim rested on unfair representation, he concurred with Justice Goldberg but believed that this raised a serious question of pre-emption which should be re-argued. 375 U.S. at 359-60.

For purposes of the present case, the key aspect of *Humphrey* is that the plaintiffs in that case did not assert any rights against the union based on the collective bargaining agreement, and no member of the Court held that such rights could be asserted in a Section 301 suit. Plaintiffs asserted certain rights against the employer, and claimed that those rights had survived the grievance settlement because that settlement was invalid and void for the reasons stated above. Although the union was joined as a defendant because the validity of the grievance settlement was an essential issue in the case, the Court treated the case as essentially a suit against the employer for breach of the agreement, and therefore within Section 301 of the Labor Management Relations Act, under the authority of *Smith* v. *Evening News Ass'n,* 371 U.S. 195 (1962). In the opinion of the concurring Justices, the suit was only (Goldberg and Brennan, J.J.) or also (Harlan, J.) one for breach of the duty of fair representation implied from Section 9(a) of the National Labor Relations Act. But neither the majority nor the concurring Justices indicated that a suit against a union alone for failing to process a grievance could be based upon anything other than the statutory duty of fair representation.

It is against this background that we approach the issues

presented in this case. Those issues are (1) did the union in this case fail to meet the standard of responsibility to employees in the handling of their grievances imposed by the duty of fair representation, and (2) if it did, is the remedy in damages here invoked an appropriate one.

III. THE UNION IN THIS CASE DID NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION

The complaint in this case alleged, in substance, that plaintiff's employer, Swift & Company, had violated its collective bargaining agreement with the defendant union by refusing to permit plaintiff to return to work on the ground that he was physically disabled, when in fact he was physically able to work, and that the union "arbitrarily, capriciously, and without just or reasonable reason or cause" refused to process his grievance to arbitration. The theory of the complaint appears to be that a union has a legal duty to process meritorious grievances through all the grievance steps, and that if an employee can satisfy a court or jury that he had a meritorious grievance which the union refused to process, then he is entitled to recover damages from the union based on his lost earnings. Although the complaint alleged that the union "arbitrarily" and "capriciously" refused to process the grievance, it is clear from the plaintiff's proof that his theory was that if the jury should find, as it subsequently did in this case, that the grievance was in fact meritorious, any decision by a union not to process it on the ground that it lacked merit was *ipso facto* arbitrary and capricious, and therefore unlawful.

This was also the theory of the Supreme Court of Missouri. In holding that there was sufficient evidence to support the jury's finding that the union had "arbitrarily" and "without just cause or excuse" failed to process the grievance, the Court said:

"We have concluded that there was sufficient evidence from which the jury reasonably could have

found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants." (R. 217).

In short, the court held that the evidence in the record which tended to show that the plaintiff was sufficiently healthy to perform his job was all that was required to support the judgment against the union. The union had acted "arbitrarily, if so, and without just cause or excuse" (R. 161) because it was wrong in its evaluation of plaintiff's physical condition.

The absence of any other basis for its holding is underlined, not only by the fact that the plaintiff produced no evidence whatsoever of hostility or discrimination against the plaintiff and the jury was required to find none, but also by the Missouri court's treatment of the pre-emption question. In its view, if it were alleged that the union was hostile to Owens, or discriminated against him, the court would have no jurisdiction. The question, in such a case, would be one for the National Labor Relations Board. The court had jurisdiction, it believed, precisely because the only claim was that the union was honestly wrong on the merits of the grievance.

We believe that the governing federal law with respect to the union's responsibility in the processing of grievances

is directly contrary to the standard thus imposed by the Missouri court.

Most of the duty-of-fair-representation cases which have come to this court have involved claims of racial discrimination by the union. Obviously, it is indefensible for a union to refuse to process an employee's grievance, or to make any other collective bargaining decision, solely because of racial considerations, and the cases involving such conduct have not required any extensive consideration of the scope of the duty of fair representation.

In those cases which have not involved discrimination against employees on racial or other invidious or irrelevant grounds, however, the Court has held that a union has wide discretion in the performance of its collective bargaining functions. Thus, in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), the Court said:

> "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. Th complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

Similarly, in *Humphrey* v. *Moore*, 375 U.S. 335, 350 (1964), the Court again held that a union had the right to take a position on a seniority issue which was contrary to the interests of certain employees, so long as the union "took its position honestly, in good faith, and without hostile discrimination."

Significantly, the Court applied precisely the same standard in both *Huffman* and *Humphrey*, although one involved the negotiation of an agreement and the other, in the view of the majority of the Court, involved the settlement of a grievance. We believe the same standard must be applied in the present case.

The only way in which the present case differs from those cited above is that the union's decision in this case not to take the plaintiff's grievance to arbitration was based primarily on a factual determination, namely that the plaintiff was not physically able to work, while *Huffman* and *Humphrey* each involved a policy decision by a union as to which of two conflicting sets of employee interests was most worthy of protection. In neither type of case, however, is it proper for a court or jury to substitute its judgment for the judgment of the bargaining representative which is authorized by statute to represent the employees involved.

In the day to day handling of grievances, unions are constantly called upon to make factual determinations similar to the one involved here. Almost every discharge case, for example, involves a factual question as to whether the employee did or did not commit the offense for which he has been discharged. Most promotion cases involve the question of whether the employee has the ability to perform the job to which he seeks to be promoted, or how his ability to perform that job compares with the ability of the employee whom management wishes to promote. When an employee claims that he has been refused a vacation or a leave of absence, the question frequently presented is how essential the employee's presence on the job was at that particular time.

Whether the grievance presents factual questions such as the examples cited above, or whether it presents a problem of interpretation of the language of the collective bargaining agreement, the union has an obligation to make a determination as to its merits. This obligation runs both to the

employees and to the employer. "The employer expects and demands that the Union 'screen' grievances, and the Union must do so if it wants the grievance procedure preserved and future grievances fairly considered by the employers." *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782, 793 (D. Md. 1959), *affirmed*, 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960). If all grievances were to be pressed by the union, regardless of its view as to the merits, the entire procedure which has so carefully been erected would collapse.

Such a result would be contrary not only to the interests of the union but to the objectives of the federal labor policy. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), states that "Final adjustment by a method agreed upon by the parties themselves is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." The emphasis, both here and in Section 9(a), is on agreement as the method of settling disputes, agreement not only on the rules to govern the industrial community but also on the application of those rules on a case-by-case basis.

Arbitration exists, and performs the important function described by this court in *Warrior & Gulf*, to provide a terminal point in the event of disagreement. But arbitration would itself disappear if it were required to be utilized in every grievance. It has been said that "a company that has never really accepted collective bargaining may, by refusing to settle anything, overload arbitration to the point of breakdown."[1] Equally, a union, by refusing to settle anything, can make the process unworkable. Arbitration can exist as the capstone of the grievance procedure only if both parties can, as they do, reach agreement in the vast majority of cases in the grievance procedure without resorting to it. It

[1] Fuller, *Collective Bargaining and the Arbitrator*, Proceedings, Fifteenth Annual Meeting, National Academy of Arbitrators (BNA, 1962), p. 49.

is successful insofar as it encourages the parties to settle grievances without resort to decision. See Alexander "Impartial Umpireship," in *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators (BNA, 1959) p. 146. See also Ross, "Distressed Grievance Procedures and Their Rehabilitation," in *Labor Arbitration and Industrial Change*, Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators (BNA, 1963), p. 104.

Thus, it is as much a part of the federal labor policy with respect to arbitration that unions screen grievances and refuse to process to arbitration those which they find lacking in merit as it is that they be entitled to insist upon arbitration of those which they believe do have merit. But it would obviously be impossible for a union to perform that function if its determination that a grievance lacks merit were reviewable *de novo* by a court or jury. When the merits of a grievance depend upon an issue of fact, there will almost always be some evidence supporting the grievant's side—his own testimony, if nothing else. Thus, the risk of a lawsuit, and an adverse verdict, would be present in every case in which a union found a grievance lacking in merit on factual grounds. This would necessarily make a union extremely reluctant to refuse to process any grievance which was supported by any evidence, regardless how strong the evidence on the other side might seem to the union, since a court or jury would always be free to make its own independent evaluation of the evidence.

It is therefore simply inconsistent with the nature and purpose of a grievance procedure, and with the federal labor policy, to permit courts to review *de novo* the correctness or the wisdom of a union's decision to settle or drop an employee's grievance. The union's sole obligation is to make its decision honestly and in good faith.

With the exception of the decision in the present case, this has been the unanimous view of the courts. For example, in *Donnelly* v. *United Fruit Co.*, 40 N.J. 61, 190

A.2d 825, 843-44 (1963), the court stated: "The courts cannot concern themselves with the wisdom of the union's action . . . [S]o long as the union in good faith exercised an impartial discretion in reaching its decision that there was good cause for the discharge, judicial intervention is impermissible." In *Brandt* v. *United States Lines*, 246 F. Supp. 982, 984 (S.D.N.Y. 1964), the court held that "where the Union refuses to prosecute an employee's claim in good faith and on the basis of a thorough investigation . . ., the employee has no cause for complaint . . ." In *Stewart* v. *Day & Zimmerman, Inc.*, 294 F.2d 7, 11 (5th Cir. 1961), the court held that in the absence of collusion or fraud "union officials should be given a wide latitude in deciding intra-union disputes and . . . courts should be slow to intervene in them."

In the present case, the plaintiff did not present the slightest shred of evidence that the union's refusal to take his grievance to arbitration was based on anything other than its decision, made honestly and in good faith, that the grievance was lacking in merit. The plaintiff sought only to prove that the grievance was meritorious. As for the plaintiff's testimony that the union offered to take the case to arbitration for $300, that testimony, if believed, shows only that the union was willing to take what it believed to be an unmeritorious grievance to arbitration if the plaintiff assumed part of the cost. If the union had no obligation to take it to arbitration at all, it would plainly not be a violation of the duty of fair representation for the union to offer to take the grievance nevertheless if the grievant assumed part of the cost.

Even if we assume that plaintiff, in order to recover, need not show dishonesty or bad motive, but only that his grievance had merit, clearly any right to recover which he might have on such showing should disappear if the union, in reply, shows affirmatively the good-faith basis upon which it acted. The union made such a showing here. Its evidence showed that after processing the grievance through

all of the steps of the grievance procedure the union made an effort to obtain sufficient evidence on which to proceed to arbitration. It paid for a complete physical examination of the plaintiff, by a doctor of his choice. Only when that doctor reported that, in his opinion, the plaintiff was unable to work and, indeed, would die if he returned to work (R. 90, 101), did the union decide not to proceed with arbitration.

The evidence as to the union's decision here sharply delineates the issue. Jamerson, the union representative who processed the grievance, believed that it was no part of his job to evaluate the grievance and that the grievance should therefore be arbitrated if the plaintiff wanted it arbitrated. The union executive board, on the contrary, felt that it should not process the case to arbitration without a medical evaluation and, when that evaluation proved to be adverse, decided to hold the case in the fourth step in the hope that some change would develop which would offer some prospect of winning at a later date. Jamerson's view is precisely the view which, if it prevailed, would destroy the grievance procedure and arbitration. The union's view is the view which is essential if this form of industrial self-government is to be effective. By acting as it did the union fulfilled the function which it is the purpose of the federal labor policy to encourage. The Missouri court, in holding the union liable for so doing, contravened that policy, and its decision must be reversed.

IV. SINCE THE NATIONAL LABOR RELATIONS BOARD HAS HELD THAT VIOLATION OF THE DUTY OF FAIR REPRESENTATION IS AN UNFAIR LABOR PRACTICE, THE COURTS ARE PRECLUDED FROM ENTERTAINING SUITS TO REMEDY SUCH VIOLATIONS

In the preceding section of this brief, we have shown that if the union had any obligation to take the plaintiff's grievance to arbitration, that obligation would have to be based

on the union's statutory duty of fair representation, which derives from Section 9(a) of the National Labor Relations Act. We turn now to the question of whether that duty is enforceable by the courts or by the National Labor Relations Board as an unfair labor practice under Section 8(b) of the Act.

Until 1962, it had generally been assumed that the duty of fair representation under the National Labor Relations Act, as under the Railway Labor Act, was judicially enforceable. Many actions alleging breach of the duty were entertained in the courts without reference to the possibility that the NLRB might have jurisdiction over such matters. See, *e.g.*, *Trotter* v. *Amalgamated Ass'n of Street Ry. Employees*, 309 F.2d 584 (6th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); *Hardcastle* v. *Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962); *Stewart* v. *Day & Zimmerman, Inc.*, 294 F.2d 7 (5th Cir. 1961); *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *affirmed*, 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960). Occasionally the issue was raised, but since the Board had never held that it had broad jurisdiction to remedy a violation of the duty of fair representation the courts tended to assume that the matter fell outside the Board's authority. *E.g.*, *Berman* v. *National Maritime Union*, 166 F. Supp. 327 (S.D.N.Y. 1958). The issue was presented to this Court in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), but this Court chose to decide the case on other grounds. 345 U.S. at 332, n.4. See also *Syres* v. *Oil Workers*, 223 F.2d 739 (5th Cir. 1955), *reversed* 350 U.S. 892 (1955).

In a series of cases decided since 1962, however, the Board has held that violations of the duty of fair representation are "unfair labor practices" under Section 8(b) of the Act, 29 U.S.C. § 158(b), and that it therefore has jurisdiction to remedy them. The first of these cases was *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*

326 F.2d 172 (2d Cir. 1963). In that case, the Board held that the right of employees to be fairly represented is one of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157, and that "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" is an unfair labor practice under Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). The Board specifically relied on Steele and the other Railway Labor Act decisions of this Court.[8]

In *Independent Metal Workers Union (Hughes Tool Co.)*, 147 N.L.R.B 1573 (1964) the Board held that a union's failure to process an employee's grievance on grounds of race was an unfair labor practice under Sections 8(b)(1)(A), 8(b)(2) and 8(b)(3), 29 U.S.C. §§ 158(b)(1)(A), (2), (3). In that decision, the Board explicitly stated that the duty which it was enforcing was enforced by the courts under the Railway Labor Act solely because, under that Act, there is no administrative enforcement machinery:

> "When the Supreme Court enunciated the duty of fair representation in *Steele* and *Tunstall, supra*, which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical

[8] The Second Circuit reversed the *Miranda* decision, but there was no majority on the question of whether a violation of the duty of fair representation is an unfair labor practice. Judge Medina wrote an opinion holding that the Board's jurisdiction is limited to cases where "the union or the employer . . . have committed some act the natural and foreseeable consequence of which is to be beneficial or detrimental to the union," and that other forms of unfair or discriminatory action by a union are remediable only in the courts. 326 F.2d at 175-180. Judge Lumbard concurred in the result without reaching this question, and Judge Friendly dissented.

to certain unfair labor practice provisions of the National Labor Relations Act are enforcible by the Federal courts, not an administrative agency. . . . After enactment of the Taft-Hartley Act . . . an administrative remedy [for breaches of the duty of fair representation] became available in our view. . . ." 147 N.L.R.B. at 1575.

The Board has applied its rule that breach of the duty of fair representation is an unfair labor practice in several subsequent cases. *Local 1367, International Longshoremen's Ass'n*, 148 N.L.R.B. 897 (1964) (now pending on review in the Fifth Circuit); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964), (now pending on review in the Fifth Circuit); *International Union, United Automobile Workers*, 149 N.L.R.B. 482 (1964); *Cargo Handlers, Inc.*, 159 N.L.R.B. No. 17 (June 17, 1966).

It is, of course, well-established that the jurisdiction of the National Labor Relations Board to remedy "unfair labor practices" as defined in the Act is exclusive:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting

adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 490-91 (1953).

Admittedly, the question of whether violation of the duty of fair representation is an unfair labor practice is far from clear. Two members of the Board, McCulloch and Fanning, have consistently dissented in these cases, and a third member who was recently appointed, Samuel Zagoria, has yet to express himself on this issue. The only court of appeals which has so far passed upon the question was also divided on it. *NLRB* v. *Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963). But so long as the Board continues to adhere to its position, its exclusive jurisdiction must be respected. As this Court held in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 244-45.

It is significant that *Garmon* involved conduct which this Court, in a subsequent case, decided was not an unfair labor practice. *NLRB* v. *Drivers Local 639*, 362 U.S. 274 (1960). Similarly, this Court may someday decide that violation of the duty of fair representation is not an unfair labor practice. But that question is not presented here. It can only be presented in a case which is decided by the Board in the first instance, and then comes to this Court on review of the Board's decision. In this case, the only question is whether a violation of the duty of fair representation is "arguably"

an unfair labor practice, and the Board's decisions on the subject obviously show that it is.[16]

There is only one exception to the Board's exclusive jurisdiction to remedy unfair labor practices, and that exception is expressly provided in Section 303 of the Act, 29 U.S.C. § 187, which authorizes suits for damages for violations of Section 8(b)(4), 29 U.S.C. § 158(b)(4). There are certain other situations in which courts are permitted to provide relief for conduct which may also be an unfair labor practice, but those are all situations in which the duty which the court is permitted to enforce is one which exists independently of the National Labor Relations Act, and which is not affected by the Act. Thus, state courts may remedy certain types of violations of state law even though the same conduct may be an unfair practice. *E.g.*, *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (violence); *United Constr. Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954) (violence); *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966) (libel); *International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617 (1958) (violation of union constitution). Similarly, state or federal courts may remedy violations of a collective bargaining agreement, even though the conduct which constitutes that violation may also be an unfair labor practice. *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). But there is no case in which this Court has ever held that a duty which is cre-

[16] By the time the present case is reached for argument in this Court, there may also be before the Court one or two cases coming from the Board involving the question of whether a violation of the duty of fair representation is an unfair labor practice. Two such cases have already been argued in the Fifth Circuit. *Local 1367, International Longshoremen's Ass'n*, 146 N.L.R.B. 897 (1964); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964). Should those cases reach this Court, and should the Court conclude, contrary to the view of the NLRB, that violation of the duty of fair representation is not an unfair labor practice, then the jurisdictional issue in the present case would disappear. Cf. *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24, 27 (1963).

ated by the National Labor Relations Act, and which is enforceable by the National Labor Relations Board, is also enforceable by a court. There is, in other words, no such thing as concurrent jurisdiction to remedy unfair labor practices as such, except for the single situation expressly provided for in Section 303.

It follows, therefore, that so long as the Board takes the view that violation of the duty of fair representation imposed by Section 9(a) of the Act is also an unfair labor practice under Section 8(b), the courts are precluded from taking jurisdiction of cases involving claimed violations of that duty. Since this is such a case, the court below should have dismissed it for lack of jurisdiction.

V. AN AWARD OF DAMAGES IS NOT IN ANY EVENT THE APPROPRIATE REMEDY FOR A UNION'S IMPROPER REFUSAL TO TAKE A GRIEVANCE TO ARBITRATION

The third question stated in the petition for certiorari here is whether the proper relief in this suit was an award of damages based on the assumption that Owens' grievance would have been sustained if taken to arbitration or, to the contrary, an order requiring that the grievance be arbitrated. This question need not necessarily be decided in this case. It was not decided below and, although petitioners below did object to the trial court's assumption that Owen's grievance, if processed, would have been granted by an arbitrator (R. 169), no direct challenge to the appropriateness of an award of damages was made. Furthermore, this case is so clearly one in which no remedy at all is appropriate that any issue as to what the remedy should be if a case had been made out for a remedy is extremely hypothetical.

For these reasons, we have reserved for the end of this brief any discussion as to the question of whether a recovery in damages is proper even if the case be one in which it is

found that some relief should be granted. Despite our doubt as to whether decision on the question is necessary, we do feel it appropriate to present our views on this subject to the Court. We do so both because we raised it in our petition and because, as we have earlier indicated, we believe that this case should be decided in the context of the federal law governing the collective bargaining agreement and its administration. The question of remedy is certainly part of that context, and the nature of the remedy which will be granted is certainly of importance in determining the standard for intervention of the judiciary, or, for that matter, of the Labor Board.

Our view of the importance of the grievance procedure and of the necessity that a union be given authority to resolve and to settle grievances in that procedure does not by any means imply that where the union fails to act fairly or responsibly in performing that function the individual grievant should have no remedy. To the contrary, we concur in the view that the grant of union authority carries with it a fiduciary obligation for breach of which an appropriate remedy must be provided. The cases in which such a remedy would be appropriate are not only cases of racial discrimination but also cases in which it is clear, from that evidence, that the union is hostile to the grievant or indifferent to the merits of the grievance, or cases in which there is a showing of gross negligence on the part of the union in protecting his rights.

It does not follow, however, that the appropriate remedy in such cases is a suit for damages either against the union, as was sought in this case, or against the employer. Indeed, we believe that the principles which this Court has enunciated in the cases beginning with *Lincoln Mills* and which were most recently applied in *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965) require quite a different solution.

In *Maddox*, this Court dealt at length with the importance of resolving grievances through the procedures pro-

vided in the collective agreement, rather than through litigation in the courts. The *Maddox* opinion acknowledged that, in *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941), the Court had held that under the Railway Labor Act an employee could bring suit for damages for a discharge alleged to be in violation of a collective bargaining agreement if the law of the state did not require exhaustion of remedies under the agreement. Subsequently the Court refused to apply this rule to any cases other than those in which the employment relationship had terminated. *Slocum* v. *Delaware L & W. R. Co.*, 339 U.S. 239 (1950). In *Maddox*, the Court was asked to extend the distinction between termination grievances and other grievances to the National Labor Relations Act. The Court not only refused to do so but raised serious doubt as to whether a rule permitting damage suits in Railway Labor Act cases was consistent with the Court's later recognition in *Machinists* v. *Central Airlines*, 372 U.S. 682 (1963) that federal law, rather than state, governed such suits. It set forth at some length the reasons why permitting such a suit was incompatible with the federal labor policy and concluded that, as a matter of federal law, the grievant must at least attempt to use the grievance procedure before instituting suit, whatever the nature of his grievance.

We believe that the same considerations and the same reasoning upon which the Court relied in *Maddox* require that the remedy, where a grievant has attempted to exhaust the procedure and the union has wrongfully refused to handle his case, should be an order directing arbitration rather than a suit for damages.

There are two basic reasons why a suit for damages is not the appropriate remedy in a case of this kind, whether that suit be against the employer or the union. Let us deal first with the suit against the employer, such as the suit in *Maddox*. There is somewhat greater justification, it is true, for such a suit than for one against the union. The basic

cause of action, after all, is that the employer has breached the agreement. The failure of the union to process the grievance has barred the grievant from obtaining relief but it is fundamentally the employer, not the union, whose breach of contract has caused the grievant's harm and, therefore, it can be argued, the grievant should be permitted to sue it to recover his damage. This is the view which has been adopted by the Maryland Court of Appeals. *Jenkins* v. *Schluderberg-Kurdle Co.*, 217 Md. 556, 144 A.2d 280 (1958). This also was the view of this Court where it found that, under the Railway Labor Act, the union attempted, without proper authority, to settle a grievance. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945).

The first difficulty with such a suit, even as against the employer, is that in such a suit the plaintiff, in order to recover, must not only show an unjustified refusal by the union to press the grievance but also must try the grievance itself before the court. Such a result is squarely contrary to the principles established by this Court in *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960) and reiterated in *Maddox*. As the Court said in *American Manufacturing*, "when the judiciary undertakes to determine the merits of a grievance . . . it usurps a function which . . . is entrusted to the arbitration tribunal." 363 U.S. at 569. This is as true, we submit, where judicial determination occurs as a result of the failure of the union to process a grievance as when it occurs under the guise of interpreting the arbitration provision.

In *Maddox*, the Court said that it was in the union's interest "to participate in interpretations of the contract, and to have an arbitrator rather than a court decide such questions as whether the company has determined to 'close permanently.'" [Or, we might add, whether an employee was discharged for "just cause."] 379 U.S. at 656. It is equally, we submit, in the employer's interest. The em-

ployer as well as the union has bargained for an arbitrator's judgment, and it is inappropriate to subject either to the decision of a court, even if the failure to use the arbitration process is a result of the union's dereliction.

There are other reasons, not present in *Maddox*, why the remedy of a suit for damages is inappropriate. In *Maddox*, the relief which could be granted in such a suit was substantially the same as would presumably have been granted by an arbitrator if the individual's claim had been sustained. But in other cases this is frequently not true. Under the regime normally contemplated by a collective bargaining unit, damages are normally not awarded. This is clearest in cases such as this one, involving a claimed wrongful termination of employment. Arbitrators do not award damages in such cases. The usual remedy is reinstatement with back pay, a remedy with consequences far different, both to the plaintiff and to the defendant, than a damage suit which may encompass prospective earnings for the period of the employee's life expectancy.[9]

Nichols v. *National Tube Co.*, 122 F. Supp. 726 (N.D. Ohio, 1954), provides a nice illustration. An employee was compulsorily retired. He brought suit against his employer claiming that this constituted an impermissible discharge under the collective bargaining agreement. The direct court entertained the suit, found that compulsory retirement was contrary to the collective agreement and entered judgment for the individual plaintiff in the sum of $25,000, based on his life expectancy. The court of appeals reversed on the ground that, as it construed the agreement and the collective bargaining history, the company had the right to retire the plaintiff. *United States Steel Corp.* v. *Nichols*, 229 F.2d 396 (6th Cir. 1956).

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[9] For a more extended discussion of this point, see Feller, "Remedies in Arbitration" in *Labor Arbitration—Perspectives and Problems*, Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators (BNA, 1964) pp. 1938 ff.

It is submitted that both courts were wrong in *Nichols*, not only because the employee had not first attempted to utilize the grievance procedure as *Maddox* now requires, but also because they decided questions reserved for arbitration and awarded a remedy different than that contemplated by the collective bargaining agreement.

What we have said about a suit against the employer applies with equal, and indeed, greater force to a suit against the union. The underlying contract violation, as we have said, is by the employer. And the remedy obtainable in a suit against it is perforce different than that which an arbitrator would award. In a discharge case it is simply not within the power of the union to reinstate the grievant. Nor can the union provide a promotion, in a seniority case, or a rate adjustment in a job classification case.

For all of these reasons, we believe that the appropriate remedy where a union has violated its duty in failing to take a grievance to arbitration is not a damage suit against either the union or the employer but an order directing that the grievance be arbitrated. Such an order will provide both the proper forum and the proper relief. The suit should be brought against both the union and the company. The order should be directed against both and should provide such safeguards as may appear appropriate (including the right of individual representation) to insure that the individual's case is fairly presented.

One of the objections to this remedy is that in the typical case (although not in this one because the grievance was in a "hold" posture by agreement when the suit was filed) the time limits set forth in the grievance procedure for taking a case to arbitration would have long expired before any court could determine that the union improperly failed to invoke that procedure. Requiring arbitration, therefore, might impose upon the employer greater burdens than he had contracted to assume, particularly in a case involving a potential claim for back pay. The appropriate solution

to this problem, we believe, would be to order arbitration, without regard to time limits on the theory that, if the employer has violated the contract, he should not be relieved of responsibility because of the union's dereliction. But, by the same standard, his responsibility should not be increased. Accordingly, any order directing arbitration should provide that any costs, such as increased back pay if the grievance should be sustained, imposed upon the employer by the union's initial failure to process the grievance to arbitration should be recoverable against the union.

Such a remedy, we believe, appropriately preserves the rights of the grievant, the union and the employer, and the federal labor policy. Adjudication is had in the forum which the parties had agreed upon. The remedy to be provided is the remedy normally provided in such a forum, not the very different recovery which may be entailed in a suit for damages. The employer is saddled with no greater obligation than that which he assumed under the collective bargaining agreement. And the union is taxed with damages for its own breach, which is not the breach of the collective bargaining agreement, but the breach of its duty to present the claim that such breach occurred. Such a remedy should be available, we believe, not in every case in which the union has refused to process the grievance—for that would substantially undermine the union's necessary authority to settle grievances—but in those cases in which a court finds that the union has violated its duty of fair representation.

In this case, Owens did sue both the union and the employer. But he sued them separately.[10] And in each suit he asked, not for the arbitration to which he claimed

[10] In January, 1961, Owens filed suit against the employer, seeking damages for his discharge. *Owens* v. *Swift & Co.*, No. 631293, Circuit Court of Jackson County, Missouri. The suit is still pending by stipulation of the parties that it be continued until the appeal in the present case is determined.

he was entitled, nor for the remedy of reinstatement with back pay which an arbitrator might have awarded him, but for damages. Both suits, we submit were improper under the governing federal law, and the judgment obtained in this one should be reversed.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

Article I, Section 8 of the Constitution provides, in pertinent part:

> "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."

Article VI, cl, 2, of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958), provides, in pertinent part:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) To restrain or coerce (A) employees in

the exercise of the rights guaranteed in section 7: . . .

* * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a); . . ."

* * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, . . ."

Section 9(a) of the National Labor Relations Act, 61 Stat. 143 (1935), as amended, 29 U.S.C. § 159(a) (1958), provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Section 10(a) of the National Labor Relations Act, 49

Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958), provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."